Supreme Court, U. S.
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IN THE
Supreme Court of the United States
October Term, 1978

No. 78-921

LOUIS RUCCI,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. . . . . .

LOUIS RUCCI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner petitions for a writ of certiorari from the denial of a timely motion for reconsideration and suggestion for an en banc hearing entered in the United States Court of Appeals for the Second Circuit on the 13th day of November, 1978. On the 17th day of August, 1978, the United States Court of Appeals affirmed the judgment of conviction entered on the 28th day of April, 1978 in the United States District Court for the Eastern District of New York (Sifton, J.), sentencing petitioner to a term of three years on his plea of guilty to evasion of income tax in violation of 26 U.S.C. 7201 and 7206(1), following denial of a motion to suppress evidence used to obtain the indictment, for illegal use of evidence obtained through electronic surveillance.

The opinion of the District Court for the Eastern

District of New York denying the motion to suppress the evidence against petition was not officially reported and is reproduced in Appendix A herein. The Court of Appeals for the Second Circuit did not write an opinion on its affirmance of the conviction or denial of the application for reconsideration or suggestion for an en banc hearing. The judgment of the Court of Appeals for the Second Circuit is reproduced in Appendix B herein. The order of the Court of Appeals for the Second Circuit denying the application for reconsideration or suggestion for an en banc hearing is reproduced in Appendices C and D herein.

JURISDICTION

The judgment of the Court of Appeals was entered on August 17, 1978. A timely notice of motion for reconsideration and suggestion for en banc hearing was filed and denied by order entered November 13, 1978.

The jurisdiction of this Court to review the judgment of affirmance by certiorari is conferred by 28 U.S.C. 1257.

QUESTIONS PRESENTED

1. Is the Government privileged to use witnesses, the identity of whom were learned through state court ordered electronic surveillance, to secure an indictment for federal income tax violation, despite the fact that such type crime is not one of those specified in 18 U.S.C. 2516 for which electronic surveillance is authorized?

2. Is the Government privileged to use witnesses obtained from state officials, whose identities were learned through state court ordered electronic surveillance subsequently declared to be illegal, without proof that such witnesses would have been inevitably discovered through other investigative methods?

3. Is an investigative or law enforcement officer privileged by 18 U.S.C. 2517 to disclose information to federal law enforcement officers to be used in a Grand Jury investigation, obtained from state court ordered electronic surveillance, ultimately declared to be in violation of state law?

4. May evidence of a federal crime discovered in the course of a state court ordered electronic surveillance be used in the absence of an amendment of the court order to include authorization to use such evidence?

STATUTES INVOLVED

18 U.S.C. 2516 provides as follows:

Authorization for interception of wire or oral communications.—

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title; chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots) (18 USCS §791-800, 2151-2157, 2381-2391 or 2101, 2102);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on

payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 embezzlement from pension and welfare funds), section 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassinations, kidnapping, and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under section 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney or any political subdivision thereof, if such attorney is authorized by a

statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Authorization for disclosure and use of intercepted wire or oral communications.—

(1) Any investigative or law enforcement officer who, by any means authorized bythis chapter (18 USCS §§2510-2520), has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter (18 USC §§2510-2520), has obtained knowledge of the contents of any wire or oral communications or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter (18 USCS §§2510-2520), any in-

formation concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter (18 USCS §§2510-2520) may disclose the conents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter (18 USCS §§2510-2520) shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter (18 USCS §§2501-2520). Such application shall be made as soon as practicable.

Section 700.50 of the New York Criminal Procedure Law provides as follows:

"2. Immediately upon the expiration of the period of an eavesdropping warrant, the records of communications made pursuant to subdivision three of section 700.35 must be made available to the issuing justice and sealed under his directions."

Section 700.65 of the New York Criminal Procedure Law provides as follows:

"4. When a law enforcement officer while engaged in intercepting communications in the manner authorized by this article, intercepts a communication which was not otherwise sought and which constitutes evidence of any crime that has been, or is being or is about to be committed, the contents of such communications, and evidence derived therefrom, may be disclosed or used as provided in subdivisions one and two. Such contents and any evidence derived therefrom may be used under subdivision three when a justice amends the eavesdropping warrant to include such contents. The application for such amendment must be made by the applicant as soon as practicable. If the justice finds that such contents were otherwise intercepted in accordance with the provisions of this article, he may grant the application."

STATEMENT OF THE CASE

On the 8th day of May, 1973, Kings County Supreme Court issued an order authorizing electronic surveillance of conversations over petitioner's business telephone for purposes of securing evidence of criminal possession of stolen property, criminal usury, burglary and conspiracy to commit such crimes, based upon an affidavit of New York County Assistant District Attorney Lewittes, setting forth information from a confidential informer. The order was subsequently renewed and amended to authorize interceptions of evidence of commercial bribery. The order was expanded to encompass electronic surveillance through the use of concealed microphones. Ultimately, in November of 1973 the surveillance came to an end.

Petitioner and various others were indicted by the New York County Supreme Court, by use of information

obtained through the electronic surveillance, for various crimes. On the 14th day of January, 1976, petitioner pleaded guilty in State Court to the crimes of criminal usury and illegal possession of stolen property. On March 11, 1976, petitioner was sentenced to a three year term on his State conviction.

However, subsequent to petitioner's sentence, other persons who had been indicted from information gathered through the electronic surveillance, to wit, Joseph Viola and Paul Corallo, discovered that the State electronic surveillance was illegal, by reason of the failure to promptly seal the tapes "immediately" within the meaning of Section 700.50(2) of the New York Criminal Procedure Law.

Viola and Corallo, by counsel, moved New York County Supreme Court Justice George Roberts to suppress all evidence resulting from the electronic surveillance. On the 13th day of October, 1976, Justice Roberts granted the motion, suppressing the evidence and dismissing the indictment against Viola and Corallo, writing in his decision as follows:

> "This is a motion by the defendants to controvert eavesdropping warrants and to suppress conversations and evidence derived thereunder.
>
> The twelve orders in question covered a period from May 8, 1973 to November 15, 1973. None of the tapes which resulted from these wiretaps was sealed until January 4, 1974. The resultant delays in sealing from the termination dates of the orders vary from 211 to 49 days.
>
> The only excuse offered by the People for these delays in that they were relying on a pre-existing standard enunciated in *United States v. Poeta,* 455 F.2d 117 (1972), which permitted sealing at the end of a series of extensions of an eavesdropping warrant. This contention was raised and rejected in *People v. Simmons,* 84 Misc.2d 749 (1975), aff'd on opinion at trial term (____A.D.2d____, 1st Dept., Oct. 7, 1976, at No. 3203). Even assuming that this is a valid excuse for the failure to seal prior to the expiration of the final extension, no good cause is shown for the 49-day delay in sealing after that order expired. In view of the absence of any satisfactory explanation for the delay, the motion to suppress must be granted (*People v. Simmons, supra; People v. Nicoletti,* 34 N.Y.2d 249 (1974); *People v. Sher,* 38 N.Y.2d 600 (1976))."

Assistant District Attorney Lewittes turned over the names of the victims of the stolen property and usury crimes learned by State law enforcement agents through the electronic surveillance to the United States Attorney for the Eastern District of New York, who interviewed these witnesses and used them to testify before a Federal Grand Jury concerning the State crimes. This testimony enabled the United States Attorney to secure an indictment against petitioner for income tax evasion of the fruit of the State crimes.

Petitioner now aware of the defect in the State court ordered surveillance, moved the United States District Court for the Eastern District of New York to suppress the evidence used against him, as a product of an illegal State wiretap, so adjudicated in State Court, which had not been amended to include authorization to secure evidence of Federal Income Tax Evasion, a crime not included among those listed in 18 U.S.C. 2516, which may be prosecuted with evidence obtained by electronic surveillance. The Government did not deny that the State court ordered electronic surveillance had been adjudicated to be illegal by reason of the delay in sealing of the tapes, thereby compromising their integrity. The Government did not deny that the surveillance orders had never been amended to authorize such surveillance to secure evidence of Federal income tax evasion, as required by Section 700.65 of the New York Criminal Procedure Law. The Government did not deny that Federal Income Tax Evasion is not a crime

for which evidence obtained by electronic surveillance may be used, as limited by 28 U.S.C. 2516. Instead, the Government successfully argued that it is privileged to use witnesses discovered through illegal surveillance, without being burdened to prove that their discovery would have been inevitable and that amendment of the Court order, to authorize gathering evidence for an income tax investigation was not necessary, nor does it matter that Federal income tax evasion is not one of the designatged crimes that may be prosecuted by the use of evidence obtained through court ordered electronic surveillance.

The United States District Court denied the motion to suppress. Petitioner pleaded guilty and was sentenced to three years. However, permission was granted by the Court to appeal the denial of the motion to suppress. The Second Circuit affirmed the judgment, with no opinion and the motion for reconsideration or suggestion for en banc hearing was denied, ripening the case for review in this Court by petition for certiorari.

A.

18 U.S.C. 2516 DOES NOT AUTHORIZE A PROSECUTION FOR FEDERAL INCOME TAX EVASION THROUGH THE USE OF EVIDENCE SECURED BY COURT ORDERED ELECTRONIC SURVEILLANCE AND PUBLIC POLICY WOULD BE OFFENDED BY SUCH PROSECUTION.

In *Berger v. New York,* 388 U.S. 41 (1967), the Supreme Court gave the green light for Federal and State legislation to authorize the use of electronic surveillance as an investigatory tool, balancing the public policy against such potentially abusive invasion of privacy with the public need to ferret out crime. The Court therefore struck a balance, putting limitations upon the use of this dangerous tool, with it spotential for abuse. Thus, one of the limitations insisted upon by the Court was that such surveillance would be limited to only the most serious type of crimes. Congress listed those for which the prosecution might use evidence derived from electronic surveillance in 18 U.S.C. 2516. Federal Income Tax evasion was not included as one of the crimes. Congress in its wisdom realized the potential for abuse, were electronic surveillance to be used in such cases.

In *People v. Schipani,* 56 A.D.2d 126 (2nd Dept., 1977), the Appellate Division, Second Department wrote that a criminal prosecution of a non-included crime discovered in the course of electronic surveillance would not lie, by reason of the limitation set forth in 18 U.S.C. 2516, which, by its terms, is binding upon State Courts. It would therefore seem that such type prosecution would not be tolerated under State law. Therefore, the Federal Government should not be permitted to accept evidence

on a "silver platter," to permit a Federal prosecution, that would clearly be illegal under State law, as was done in the case at bar. *Elkins v. United States,* 364 U.S. 206 (1960).

It is most significant that there has never been a reported case of Federal income tax evasion prosecution grounded upon evidence obtained through electronic surveillance. In *United States v. Tortorello,* 480 F.2d 764 (2nd Cir., 1973), the Second Circuit affirmed a conviction through the use of wiretap evidence for a crime not listed in 28 U.S.C. 2516, which is in direct conflict with the State court ruling in *Schipani.* However, even in *Tortorello,* the prosecution was not for the crime of Federal income tax evasion. It is submitted that the State ruling is more in tone with the *Berger* philosophy limiting the use of electronic intrusion, than the Second Circuit permissiveness that encourages Government law enforcement officers to employ this drastic instrument far more than is healthy. Moreover, the potential for abuse by using such evidence in income tax evasion cases should be reviewed by the Supreme Court.

B.

THE FAILURE TO AMEND THE STATE WIRETAP ORDER TO AUTHORIZE INTERCEPTION OF EVIDENCE OF INCOME TAX EVASION, PRECLUDES THE PROSECUTION OF PETITIONER FOR SUCH CRIME.

In *United States v. Marion,* 535 F.2d 697 (2nd Circ., 1976) the Second Circuit ruled that evidence from a State ordered wiretap was not available for a Federal prosecution, unless the State Court order was amended to authorize the interception of such evidence for the Federal crime. Concededly, that was not done in the case at bar. It is difficult to understand how the Second Circuit reconciled the case at bar with *Marion.* Ineed, in the case at bar, the applications for the original order and extensions did not even alert the judge to whom they were made, that evidence was sought to prosecute petitioner for income tax evasion. *United States v. Masciarelli,* 558 F.2d 1064 (2nd Cir., 1977). The case at bar would seem to tolerate the use of wiretap evidence to prosecute for a given crime, without making the court aware that the interception will be used for such purpose. in this case, the Court that authorized the use of electronic surveillance was never alerted that the evidence would be used to prosecute a target for income tax evasion, a use that might well have disturbed the judge who gave his authorization to the original tap and which might have impelled him to actually prohibit such use.

Assuming arguendo that state authorities knew that they intended to turn over this information to the Federal authorities for an income tax evasion prosecution and had made their plans known to a state judge, who definitively disapproved. Under such circumstances, would a prosecution lie with the use of such evidence? The answer is self-

evident. Why then should the prosecution be permitted because State authorities deliberately concealed from the State judge their intention to misuse the information gathered to commence a Federal income tax evasion case? In the case at bar, a premium has been put on prosecutorial fraud. The Government has been permitted to put evidence to a use in a manner that the State prosecutor deliberately concealed from the State judge who issued the order and renewals. Such type misconduct raises a serious due process question and constitutes prosecutorial fraud.

C.

WHERE THE GOVERNMENT CLAIMS THE RIGHT TO USE THE TESTIMONY OF WITNESSES LEARNED THROUGH ILLEGALLY DECLARED WIRETAPPING, IT SHOULD BE PUT TO PROVE THAT SUCH WITNESSES WOULD HAVE BEEN INEVITABLY DISCOVERED.

The Government in this case makes claim to be relieved of the prohibition on the use of fruits of the poisonous tree of illegal investigation, by characterizing the use to which it puts its information as investigative rather than testimonial, a distinction without a difference.

It matters not how the use to which evidence is put be labeled. If it was come by through exploitation of the original illegality, it is tainted and may not be used. *Wong Sun v. United States,* 371 U.S. 471 (1971). The burden is on the Government to prove that the tainted evidence would have been inevitably discovered, as a condition to its use. *Nardone v. United States,* 308 U.S. 338 (1939). The Government makes no claim that it would have discovered the identity of the witnesses used to prosecute petitioner for income tax evasion. Even if such claim were made, the most to which the Government would be entitled would be a hearing to try to persuade that such information would have inevitably been learned. *Alderman v. United States,* 394 U.S. 165 (1969).

In the case at bar, the Government has taken an unacceptable position that it is free to use witnesses learned through illegal wiretapping, a position which, if upheld, will put a premium on illegality.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The rulings in the case at bar have both universal and frightening consequences. Certainly, the Supreme Court should pass on the issue whether wiretap evidence may properly be used to support an income tax prosecution, whether the Government is free to use *any* information from a State court ordered wiretap order ultimately declared illegal and whether the Government may use information derived from illegal wiretapping, by merely labeling it investigative, as distinguished from testimonial.

It is submitted that this Court should pronounce definitively on these subjects, the importance of which transcends the case at bar.

Respectfully submitted,

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APPENDIX A

Memorandum Decision and Order of United State District Court Eastern District of New York

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

77 CR 210

UNITED STATE OF AMERICA,

-against-

LOUIS RUCCI,

Defendant.

* * * * * * * * * * *

SIFTON, J.

Defendant Louis Rucci has moved in advance of his trial, on an eight count indictment charging him with tax evasion and false declarations relating to his tax liabilities for the calendar years 1971 through 1973, to suppress all information and evidence derived from illegal electronic surveillance by law enforcement officials of New York State said to have occurred over a seven month period in 1973.[1]

Defendant does not directly question the probable cause on the basis of which is conversations were subjected to electronic surveillance; nor does he argue directly that the State proceedings,

[1]In addition, defendant has moved for discovery of the State court orders authorizing electronic surveillance and supporting affidavits which have, the Court has been assured, been furnished him by the Government since the date of his motion. Defendant has also moved for production of transcripts of the tapes resulting from the surveillance. These, however, the Government states have never been in its possession or under its control.

which led to the surveillance, were simply a subterfuge employed by the Federal government to obtain evidence of Federal crimes which the Federal attorneys themselves lacked probable cause to investigatge.[2] Nor does defendant argue directly that the tapes have been tampered with or that he is put at an unfair advantage because he can no longer recall what he said in conversations recorded four years ago.[3] Instead defendant's motion is based on alleged failures by the State and Federal governments to observe specific statutory procedures designed to assure that probable cause is established and subterfuge not employed, that opportunities for tampering with tapes are minimized and that a defendant be given an early opportunity to preserve his own recollection of the contents of his recorded conversations.

The first breach of a statutory procedure of which defendant complains is an alleged failure on the part of State and Federal authorities to apply, pursuant to either 18 USC §2517(5) or NY Crim. Proc. L. §700.65(4), for an amendment of the initial authorization "as soon as practicable" after it was determined that communications had been intercepted relating to Federal offenses other than those specified in the original authorizing order. As noted in *United States v. Marion,* 535 F.2d 697, 700 (2d Cir. 1976) the purpose of the statutory requirement is to permit a reviewing court to scrutinize at an early date the situation in which a wiuretap authorized for one pur-

[2]Defendant's indirect approach to these issues is understandable since he pleaded guilty on January 14, 1976, to the State indictment which resulted from the evidence obtained through the electronic surveillance at issue here and apparently, failed to appeal the denial of his motion to suppress the product of the electronic surveillance.

[3]Again defendant's indirect approach makes sense in view of the situation which confronts him. The Government does not propose to use the tapes of the surveillance in the trial of the tax case and, indeed, has never heard or had them in it spossession. It appears undisputed that the sole use which the Federal Government has made of the product of the surveillance is to obtain the names of witnesses to interview and that it will not use the tapes themselves for any purpose in the trial of this case.

pose has turned up communications "relating to offenses" other than those originally under investigation, in order to insure that the original application was in good faith and not a subterfuge to permit the investigative agency to pursue its suspicions and hunches without probable cause.

What defendant leaves out of account, however, is that this early court review of the bona fides of a wiretap—early in the sense that no adversarial litigation has started or even been noticed—is required under both the State and Federal statute only in the limited situation in which the product of the surveillance is about to be the subject of testimony by the person who has received information concerning the surveillance, given under oath in a proceeding.[4] The early court review is under the statutes *not* required in a situation such as that presented by this case in which an investigative officer of the State has passed on

[4] Section 2517(5) provides:

> When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the oral of aurthorization or approval, the contents thereof, and evidence derived therefrom may be used disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Section 2517(3) provides:

> Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or pulicial subdivision thereof.

the product of the surveillance to a Federal investigative officer to use simply in pursuit of evidence by the Federal government. In such a situation, in which a Federal-State exchange of information is authorized by subdivision (1) and (2) of Section 2517, Subdivision (5) explicitly provides that an amendment of the original order and early court review are not required.[3] Indeed, as noted in several cases which have considered the analogous question of whether the contents of a wiretap authorized for one offense can be used to establish probable cause to obtain a warrant to search or conduct surveillance with respect to an unrelated Federal crime without an order amending the original authorization, interagency exchange of information under subdivisions (1) and (2) was intended by Congress to proceed without prior amendment where the purpose is "to establish probable cause to arrest, to establish probable cause for a search, or to develop witnesses." S. Rep. No. 1097, 90th Cong. 2d Sess. 98 (1968), U.S. Cong. and Amin. News 1968, p. 2218; *United States v. Fury,* 554 F.2d (2d Cir. 1977); *United States v. Johnson, supra,* 539 F.2d at 187; *United States v. Vento,* 533 F.2d 838, 854 (3rd Cir. 1976). Here the intergovernmental exchange of the names and addresses of Rucci's business contacts was intended to permit the Federal government to develop witnesses for use in a possible tax evasion case. No use has to date been made of the communications or evidence derived therefrom "to establish guilt directly, or to refresh is recollection." U.S. Code Cong. and Admin. News, *Supra* at pp. 2188-89. As the Court of Appeals for the District of Columbia has noted:

> "The writers of the Statute have apparently concluded that the balance of police efficiency with the need for safegur-

[3]As noted in *United States v. Johnson,* 539 F.2d 181, 187 (D.C. Cir. 1976), the fact that early court review of the bona fides of the wiretap is not available does not preclude a trial court from reviewing the bona fides of the surveillance at the time the allegedly tainted fruits of the intergovernmental exchange of information are offered at the trial. However, that is not the relief which defendant seeks here.

> ding personal privacy calls for exclusion on the fruits of illegal seizures from admission at trial, but does not demand routine judicial review prior to that time, at every stage of the investigation." *United States v. Johnson, supra,* 539 F.2d at 187.

Defendant's second complaint concerns the failure of the State government to follow statutory procedures for sealing the tapes until January 4, 1974 some forty-nine days after the expiration of the last authorizing order on November 15, 1973. There can be little question that defendant is right in arguing that the unexplained delay in sealing raises a statutory question with regard to the reliability of the tape recordings so strong as to prohibit the direct testimonial use of the recordings or of evidence tainted by the original illegality. Moreover, defendant states, without contradiction by the government that the very tapes at issue here have been suppressed at the instance of two of defendant's co-defendants in the State indictment to which he pleaded guilty because of the delay in sealing. However, once again the sealing requirement has not been viewed in this Circuit as a prerequisite to the investrigative as opposed to testimonial use of information derived from electronic surveillance, *United States v. Fury, supra,* 554 F.2d at 531-532, and it can hardly be said that the evidence of tax avoidance "derived" from this investigative use, namely the identity of witnesses to interview, is so tainted by the original illegality as to require suppression of the derived evidence. See *United States v. Karanthos,* 531 F.2d 26, 35 (2d Cir. 1976). Here the original illegality raised the possibility of unreliable tapes. But the reliability of the tapes, used solely to produce the names of witnesses to be interviewed, has only the most attenvated causal relationship with whatever evidence those interviews may have produced. See *Nardone v. United States,* 308 U.S. 338, 341 (1939)

Finally, defendant argues that he is entitled to suppression of all evidence generated in the intergovernmental exchange of leads in the Federal tax investigation because of a delay or failure on the part of both Federal and State authorities to give him notice of the taps. Of course, defendant had notice of the existence of the wiretapes prior to his plea of guilty to the State charges which followed the denial of his motion attacking the wiretap orders for lack of probable cause. Defendant's argument in this regard fails for lack of any showing of prejudice. *United States v. Fury, supra,* 554 F.2d at 528. Nor can any prejudice be imagined since all the federl authorities obtained were names of business associates of the defendant to be interviewed by Internal Revenue Service Agents. If defendant lacks the names of these associates they can be furnished him by the government as part of pretrial discovery.

Accordingly, defendant's motion to suppress is in all respects denied.

IT IS SO ORDERED.

Dated: Brooklyn, New York
SJanuary 6, 1978

S/CHARLES SIFTON
U.S.D.J.

APPENDIX B

Judgment of the United Court of Appeals for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of August one thousand nine hundred and seventy-eight.

Present: HON. ELLSWORTH, A VAN GRAAFEILAND, Circuit Judge; HON. JOHN F. DOOLING, HON. ALBERT W. COFFRIN, District Judges.

78-1192

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LOUIS RUCCI,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO, Clerk
By SARA PIOVIA, ESQ., Deputy Clerk.

APPENDIX C

Order of United States Court of Appeals for the Second Circuit Denying Petition for a Rehearing

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, * * * * on the thirteenth day of November, one thousand nine hundred and seventy-eight.

Present: HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge; HON. JOHN F. DOOLING, HON. ALBERT W. COFFRIN, District Judges

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78-1192

United States of America,
Plaintiff-Appellee,

v.

Louis Rucci,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Louis Rucci,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk

APPENDIX D

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing (to be reheard in banc)

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At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of November, one thousand nine hundred and seventy-eight.

78-1192

United States of America,
Plaintiff-Appellee,

v.

Louis Rucci,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Louis Rucci, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ IRVING R. KAUFMAN, Chief Judge.

Supreme Court, U. S.
FILED
FEB 14 1979
MICHAEL RODAK, JR., CLERK

No. 78-921

In the Supreme Court of the United States

OCTOBER TERM, 1978

LOUIS RUCCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-921

LOUIS RUCCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this criminal tax case is whether the trial court should have suppressed the testimony of certain witnesses whose identities were initially disclosed to federal officials through state-authorized wiretaps.

After a conditional guilty plea, petitioner was convicted in the United States District Court for the Eastern District of New York for income tax evasion,

in violation of 26 U.S.C. 7201, and was sentenced to a three-year prison term. The court of appeals affirmed by order (Pet. App. 7a).[1]

The pertinent facts are undisputed and may be summarized as follows: On May 8, 1973, the New York County District Attorney obtained a court order authorizing interception of communications between petitioner and unknown accomplices, transmitted over two telephone lines located at petitioner's place of business. The purpose of the interception was to gather possible evidence of criminal possession of stolen property, criminal usury, burglary, and conspiracy to commit these crimes. The court extended and amended the order on numerous occasions to include gathering of evidence of payment and receipt of commercial bribes, bribery of a labor official, grand larceny by extortion, coercion, arson, and conspiracy to commit these offenses. The district attorney also obtained separate orders to intercept conversations over petitioner's home telephone and to install eavesdropping devices in petitioner's office. These additional orders were amended and extended; all authorizations expired no later than November 15, 1973 (R. 10a-76a).[2] The recordings of the intercepted conversations were not sealed until January 4, 1974, 49 days after the termination of the last extension (R. 125a).

[1] The Second Circuit has held that an individual may plead guilty and preserve non-jurisdictional points for appeal, provided, as in this case, the government consents and the trial court accepts the reservation. See, *e.g.*, *United States* v. *Mann*, 451 F.2d 346, 347 (1971).

[2] "R." refers to the record appendix filed in the court of appeals.

In the summer of 1974, the state prosecutors engaged in investigating petitioner's activities informed the federal Organized Crime Strike Force for the Southern District of New York that they believed that petitioner might have committed violations of federal law. The prosecutors declined to reveal the basis of their belief because petitioner's activities were the subject of an ongoing grand jury presentation. However, they agreed to disclose to the federal officials the names and addresses of those individuals whom the electronic surveillance revealed to have had business dealings with petitioner. The prosecutors stated that investigation of these persons could produce possible evidence of federal crimes (R. 150a; Tr. of Nov. 22, 1977, at 13). After receipt of the names and addresses, the Strike Force transmitted the information to the Intelligence Division of the Internal Revenue Service, which thereafter conducted a two-year investigation (R. 150a-151a; Tr. of Nov. 22, 1977, at 13-14).

As a result of the New York County investigation and electronic surveillance, petitioner pleaded guilty to usury and was sentenced to a prison term of which he served two years (R. 124a, 151a, 199a). In the state court, petitioner never challenged the tape recordings of his intercepted conversations for lack of timely sealing; however, certain of his co-defendants

had their indictments dismissed on that ground (Tr. of Nov. 22, 1977, at 8-9; R. 125a).

Subsequently, a federal grand jury in the Eastern District of New York charged petitioner with income tax evasion and filing false tax returns for 1970 through 1973. Evidence before the grand jury included testimony of some witnesses whose names and addresses had been disclosed to the government by the local prosecutor as a result of the electronic surveillance authorized by the state court (R. 150a; Tr. of Nov. 22, 1977, at 16). However, no recordings or transcripts of electronic surveillance or any evidence concerning the substance of the intercepted conversations were introduced before the grand jury; nor did any person testify about the circumstances of the disclosure by the local prosecutor to the government.[3]

Petitioner moved to suppress all evidence resulting from the electronic surveillance, contending that the government had failed to amend the state court orders to specify the federal crimes (18 U.S.C. 2517 (5)) and that the federal prosecution was tainted by the state authorities' failure to seal petitioner's recorded conversations in a timely manner as required by 18 U.S.C. 2518(8) (Pet. App. 1a-2a, 5a). The district court denied petitioner's motion (see Pet.

[3] The government represented in the district court, without contradiction, that no federal official had ever seen transcripts, heard recordings, or been told the substance of the intercepted conversations by the state officials (Tr. of Nov. 22, 1977, at 16).

App. 1a-6a), and the court of appeals affirmed (Pet. App. 7a).

1. Petitioner contends (Pet. 11-12) that the government can never bring a tax evasion prosecution when the crime is discovered during the course of electronic surveillance because the federal wiretapping statute (18 U.S.C. 2510 *et seq.*) does not specifically authorize the use of electronic surveillance for the crime of income tax evasion. But even on the assumption that evidence of petitioner's tax evasion was discovered during the course of the electronic surveillance (an assumption that is not borne out by the record—see p. 4, *supra*), Section 2517(5) of the wiretap statute contemplates the use in evidence of communications relating to offenses other than those for which the interception order was approved. The Senate Report accompanying the statute explicitly supports this interpretation, and the federal courts have uniformly so held. See S. Rep. No. 1097, 90th Cong., 2d Sess. 100 (1968); *United States* v. *Masciarelli*, 558 F.2d 1064, 1067 (2d Cir. 1977); *United States* v. *Johnson*, 539 F.2d 181, 188 (D.C. Cir. 1976);[4] *United States* v. *Vento*, 533 F.2d 838, 857

[4] In *Johnson*, the court correctly recognized that there is no difference between an officer who has a legal right to his position within electronic earshot of communications and overhears a conversation relating to an offense not specified in the request for authorization to conduct electronic surveillance, and an officer who sees contraband in plain view from a vantage point where he has a right to be. "[O]ne properly overhearing unexpected villainy need not ignore such evidence" (539 F.2d at 188).

(3d Cir. 1976); *United States* v. *Pacheco*, 489 F.2d 554, 564 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975); *United States* v. *Tortorello*, 480 F.2d 764, 781-783 (2d Cir.), cert. denied, 414 U.S. 866 (1973).

The only decision to the contrary, *People* v. *Schipani*, 56 App. Div. 2d 126, 391 N.Y.S.2d 875 (1977), ignores the explicit legislative history of the wiretap statute. Petitioner argues (Pet. 11-12) that because a state prosecution for a tax offense would be illegal under *Schipani*, the federal government should be prohibited from accepting evidence on a "silver platter" for a federal tax prosecution. But the facts of this case do not implicate the "silver platter" doctrine, under which "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible * * * in a federal criminal trial." *Elkins* v. *United States*, 364 U.S. 206, 223 (1960). Here, if the evidence at issue had been obtained by federal officials in a federal wiretap, it would have been admissible.

2. Petitioner further argues (Pet. 13-14) that the federal officials could not use the information acquired from the local surveillance because the state court orders were never amended to include the crime of income tax evasion. But petitioner fails to take account of the language of Section 2517(5), which requires such an amendment only in those cases where the conversations themselves are presented in

a criminal trial or grand jury proceeding. Here, none of the intercepted conversations was used in evidence by federal officials. Indeed, the intercepted communications themselves were not even revealed to the federal officials. Instead, the state prosecutors told the federal officials that petitioner might have committed violations of federal laws and gave them the names and addresses of individuals whom the electronic surveillance revealed to have had business dealings with petitioner. Where the wiretap evidence is used merely to develop witnesses, amendment is not required. *United States* v. *Johnson*, *supra*, 539 F.2d at 187; S. Rep. No. 1097, *supra*, at 99-100.[5]

3. Finally, petitioner contends (Pet. 15) that the government is not relieved of the prohibition on the use of the fruits of illegal investigation merely because it uses the evidence obtained for investigative purposes rather than testimonial purposes. But there was no illegality here.[6] As we have pointed out above,

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[5] *United States* v. *Marion*, 535 F.2d 697 (2d Cir. 1976), upon which petitioner relies (Pet. 13), is not to the contrary. There, the evidence was presented at a grand jury proceeding; it was in that circumstance that the court held that Section 2517(5) required an amendment of the wiretap authorization.

[6] Petitioner alleges (Pet. 14) "prosecutorial fraud" and asserts that the state authorities deliberately concealed from the state court their intention to misuse the information gathered to commence a federal income tax evasion case. But petitioner made no such argument in the district court (Pet. App. 1a-2a), and there is no evidence to support it. At all events, it hardly can be said that the state authorities knew

Title III requires an amendment to the court authorization only when an intercepted communication relating to an offense other than those specified in the order of authorization is to be used as evidence in a criminal proceeding or grand jury proceeding; the statute does not require an amendment when the evidence is used solely to develop witnesses.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979

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they were gathering evidence of income tax evasion when the Internal Revenue Service subsequently conducted a two-year investigation before determining that prosecution would be appropriate (see R. 150a-151a; Tr. of Nov. 22, 1977, at 13-14).

[7] The district court also concluded (Pet. App. 5a) that the state's failure to seal the tapes immediately after the expiration of the period of the order did not require suppression because the evidence in the federal tax prosecution was not derived from the tapes. As the court observed, "the reliability of the tapes, used solely to produce the names of witnesses to be interviewed, has only the most attenuated causal relationship with whatever evidence those interviews may have produced" (*ibid.*). This factual determination does not warrant further review.

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